

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MASTABA, INC., a Philippine corporation,

CASE NO. CV-13-5049-EFS

Plaintiff,

v.

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT LAMB
WESTON'S MOTION FOR PARTIAL
SUMMARY JUDGMENT; GRANTING
PLAINTIFF MASTABA'S MOTION FOR
PARTIAL SUMMARY JUDGMENT; AND
GRANTING PLAINTIFF MASTABA'S
MOTION FOR RELIEF FROM LIMITATION
ON DISCOVERY

LAMB WESTON SALES, INC., a Delaware corporation; LAMB-WESTON, INC., a Delaware corporation; CONAGRA FOODS, INC., a Delaware corporation; CONAGRA FOODS LAMB WESTON, INC., a Delaware corporation; MICHAEL L. NEAL, individually and as to his marital community, and KENNETH SOH, individually and as to his marital community.

Defendants.

A hearing occurred in the above-captioned matter on May 13, 2014. Plaintiff Mastaba, Inc. was represented by Kyle Silk-Eglit. Gerald Kobluk appeared on behalf of Defendants Lamb West Sales, Inc., Lamb-West, Inc., ConAgra Foods Lamb Weston, Inc., Michael Neal, and Kenneth Soh (collectively, "Lamb Weston"). Before the Court was Lamb Weston's Motion for Partial Summary Judgment, ECF No. 32. Also before the Court without oral argument was Mastaba's Motion for Partial Summary Judgment, ECF No. 39, and Mastaba's Motion from Limitation on

1 Requests for Production, ECF No. 37. After reviewing the record and
2 relevant authority and listening to the arguments of counsel, the
3 Court was fully informed. For reasons set forth below, the Court
4 denies in part and grants in part Lamb Weston's motion, grants
5 Mastaba's motion for summary judgment, and grants Mastaba's Motion
6 from Limitation on Requests for Production.

I. Factual Background¹

Mastaba handles the sale of frozen potato products in the Philippines. Lamb Weston produces potato products for sale worldwide. Between 1998 and 2012, Mastaba and Lamb Weston entered into letter agreements, each with a one-year term, from January 1 to December 31 of each year.² Under the one-year service agreements, Lamb Weston was Mastaba's sole supplier of potato products and paid Mastaba a fee per net pound of French fry sales.

¹ Undisputed facts are not cited to the record. When considering the summary judgment motions and drafting this background section, the Court 1) took as true all undisputed facts; 2) viewed all evidence and drew all justifiable inferences therefrom in non-moving party's favor; 3) did not weigh the evidence or assess credibility; and 4) did not accept assertions made that were flatly contradicted by the record. See *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

² The parties propose different descriptive names for the 2011 letter agreement. Lamb Weston refers to it as a "service agreement" while Mastaba a "Sales Representation Contract." For purposes of this order, it will be called a service agreement, although the name has no effect on this Court's analysis.

1 Beginning in 2011, Mastaba and Lamb Weston entered into
2 discussions regarding their business relationship. On February 18,
3 2011, Lamb Weston sent two employees to the Philippines, new Director
4 of Sales and Businesses Development Michael Neal and Sales Agent
5 Kenneth Soh to meet with Mastaba. Mastaba alleges that at this
6 meeting Lamb Weston encouraged Mastaba to commence capital
7 investments, including a "test kitchen," hiring of additional sales
8 staff, and creating a succession plan. ECF No. 49 ¶ 10. Mastaba
9 contends that Patrick Johnson, Mastaba's General Manager, expressed
10 concern over the price of the test kitchen, and informed Lamb Weston
11 that in order to make such an investment, it would need a long-term
12 contract. *Id.* ¶ 17. According to Mr. Johnson's declaration, Mr. Neal
13 responded that Mastaba's "long term position as Lamb Weston's broker
14 is secure" and if Mastaba made the investments, he "would get Mastaba
15 a long term contract." *Id.* ¶ 19.

16 Mastaba proceeded to undertake the capital investments, building
17 a test kitchen over the course of 2011. ECF No. 33 ¶ 8; ECF No. 42.
18 Lamb Weston oversaw much of the test kitchen's planning and
19 construction. ECF No. 49 ¶¶ 22-30. On February 28, 2011, Mr. Neal,
20 in an e-mail to Mr. Johnson, instructed Mastaba to "build a
21 professional looking kitchen." ECF No. 49, Ex. A. Mr. Neal then
22 directed Mastaba to buy a commercial 50lb fryer and daylight
23 fluorescent lights. *Id.* In response, Mr. Johnson inquired from Mr.
24 Soh the reason for the purchase of such an expensive model for a
25 fryer, and Mr. Soh replied because "it is a long term investment."
26 ECF No. 49 ¶ 8. In addition to other specific requests, Lamb Weston

1 requested Mastaba send weekly reports informing Lamb Weston of details
2 on the test kitchen's progress. *Id.*, Ex. F. Mr. Soh also forwarded an
3 e-mail exchange relating to the test kitchen between Mr. Johnson and
4 he to Mr. Neal and Mr. Howe writing, "not bad, he is working fast
5 now..." *Id.*

6 In an e-mail written on June 5, 2011, Mr. Neal congratulated
7 Mastaba on its good work, ending with "we look forward to your
8 continued support for the year of 2011/2012 & many more years..." ECF
9 No. 49, Ex. P.

10 On September 7, 2011, as a result of the completion of the test
11 kitchen, Mr. Johnson sent Mr. Neal a letter regarding the long-term
12 contract as one for a term of five years. ECF No. 51 ¶ 17; ECF No.
13 49, Ex. R. Mr. Neal responded in agreement, saying the letter
14 "accurately states the current state of affairs." ECF No. 49, Ex. S.
15 However, Mr. Neal indicated to Mr. Johnson that he may not possess the
16 authority to enter into a 5-year agreement, stating "I do not know if
17 we can do a 5-year agreement? Don't think ConAgra allows such with
18 its brokers/agents?" ECF No. 49, Ex. S. Mastaba contends this was
19 the first time it had heard Mr. Neal lacked such authority. ECF No.
20 49 ¶ 71.

21 In November 2011, Lamb Weston offered three iterations of a
22 limited term service agreement. Mastaba contends these new agreements
23 had less favorable terms for Mastaba than the previous service
24 agreements. *Id.* ¶ 56. The proposed agreements reduced commission from
25 2.1% to 1% and deprived Mastaba of commission on post termination
26 sales. *Id.* One agreement would also have allowed termination without

1 cause after sixty days. ECF No. 49, Ex. T. Mastaba contends these
 2 agreements would have made its business unprofitable. ECF No. 51 ¶
 3 9.

4 On April 25, 2013, Mastaba filed this lawsuit. It asserts
 5 claims of breach of contract, promissory estoppel, quantum meruit,
 6 unjust enrichment, negligent misrepresentation, and fraud. ECF No. 1.

7 Lamb Weston filed a motion for partial summary judgment, ECF No.
 8 32, on March 10, 2014. Mastaba filed a motion for partial summary
 9 judgment, ECF No. 49, on March 17, 2014, and a Motion from Limitation
 10 on Requests for Production on March 12, 2014.

11 **II. Summary Judgment Standard**

12 Summary judgment is appropriate if the record establishes "no
 13 genuine dispute as to any material fact and the movant is entitled to
 14 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party
 15 opposing summary judgment must point to specific facts establishing a
 16 genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,
 17 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*
 18 Corp., 475 U.S. 574, 586-87 (1986). If the non-moving party fails to
 19 make such a showing for any of the elements essential to its claim for
 20 which it bears the burden of proof, the trial court should grant the
 21 summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

22 **III. Lamb Weston's Motion for Summary Judgment**

23 Lamb Weston requests partial summary judgment for dismissal of
 24 Mastaba's claims for damages related to a) an unwritten long-term
 25 contract, b) future sales or services beyond 2011 service agreement,
 26

1 and c) Mastaba's 2011 operating expenses and capital investments. ECF
 2 No. 32.

3 **A. Damages Relating to Unwritten Long-Term Contract**

4 At the heart of Lamb Weston's motion for partial summary
 5 judgment is whether there is sufficient evidence that Lamb Weston
 6 informed Mastaba it would enter into a long-term contract in exchange
 7 for Mastaba building a test kitchen and making other capital
 8 investments. Mastaba's claims rely on occurrence of this commitment
 9 during this discussion. ECF No. 1. Lamb Weston requests summary
 10 judgment on any damages relating to this discussion, asserting there
 11 is no evidence of any such promise or agreement being made and that
 12 any discussions were merely mutual expressions of an expectation of a
 13 long-term business relationship.

14 In addition to Mr. Johnson's declaration detailing multiple oral
 15 conversations of a promise,³ the existence of such a promise or
 16 agreement is supported by e-mails between Mastaba and Lamb Weston.
 17 For example, e-mails from Mr. Soh and Mr. Neal indicate that Lamb
 18 Weston took a hands-on approach to the test kitchen's development,
 19 directing Mastaba to take specific actions for its construction and
 20 providing consistent input over meticulous details. ECF No. 49, Ex. A-
 21 F. Further, Mastaba spent a year's worth of gross revenue to construct
 22 the test kitchen. ECF No. 48 ¶ 9. Mastaba's performance based on the

23
 24 ³ Lamb Weston argues that this evidence is inadmissible hearsay.
 25 However, this statement qualifies as a statement of party
 26 admission. Fed. R. Evid. 801(d)(2).

1 alleged discussions is evidence of such an agreement, as is Lamb
2 Weston's awareness and approval that such a significant investment was
3 being made.

4 The Court now turns to Lamb Weston's affirmative defenses and
5 Mastaba's claims relating to the promise or agreement for a long-term
6 contract which will be analyzed separately.

7 **1. Statute of Frauds**

8 Lamb Weston contends that enforcement of the promise for a long-
9 term contract would violate the statute of frauds.

10 The statute of frauds is governed by RCW 19.36.010:

11 In the following cases, specified in this section, any
12 agreement, contract, and promise shall be void, unless such
13 agreement, contract, or promise, or some note or memorandum
14 thereof, be in writing, and signed by the party to be
charged therewith, or by some person thereunto by him or
her lawfully authorized, that is to say: (1) Every
agreement that by its terms is not to be performed in one
year from the making thereof.

15 RCW 19.36.010

16 The Washington Supreme Court addressed similar facts in *Klinke*
17 v. *Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255 (1980). *Klinke*
18 brought action against Famous for breach of an oral contract that
19 Famous would register and issue a franchise agreement to *Klinke*. *Id.*
20 at 257. Famous raised the statute of frauds as a defense. *Id.* at 258.
21 *Klinke* countered by pleading promissory estoppel. *Id.* The Washington
22 Supreme Court ruled, "a party who promises, implicitly or explicitly,
23 to make a memorandum of a contract in order to satisfy the statute of
24 frauds, and then breaks that promise, is estopped to interpose the
25 statute as a defense to the enforcement of the contract by another who
26

1 relied on it to his detriment." *Id.* (citing *In re Estate of Nelson*,
2 85 Wn.2d 602 (1975)). See also *BKWSpokane v. FDIC*, 12-CV-521-TOR
3 (E.D. Wash. 2013).

4 As discussed, there is a genuine issue of material fact as to
5 whether Lamb Weston broke an oral contract or promise to enter into a
6 five-year written contract. If that question is resolved in favor of
7 Mastaba, Lamb Weston would be estopped from asserting the statute of
8 frauds as a defense to the oral contract under *Klinke*. Further, as
9 indicated by the parties' prior dealings, such a contract would have
10 been entered into within the year, which would have fulfilled
11 performance of the parties' alleged agreement within the year. ECF No.
12 40, Exs. F-I. Lamb Weston's motion for summary judgment is denied in
13 this regard.

14 **2. Promissory Estoppel**

15 Mastaba asserts a claim for promissory estoppel on the basis of
16 the alleged promise for a long-term contract. Lamb Weston seeks
17 summary judgment in its favor on this claim.

18 To obtain recovery in promissory estoppel, Mastaba must
19 establish "(1) a promise which (2) the promisor should reasonably
20 expect to cause the promisee to change his position and (3) which does
21 cause the promisee to change his position (4) justifiably relying upon
22 the promise, in such a manner that (5) injustice can be avoided only
23 by enforcement of the promise." *Corbit v. J. I. Case Co.*, 70 Wn.2d
24 522, 538 (1967) (citation omitted). A promise is "a manifestation of
25 intention to act or refrain from acting in a specified way, so made as
26

1 to justify a promisee in understanding that a commitment has been
 2 made." *Havens v. C & D Plastics*, 124 Wn.2d 158, 172 (1994).

3 Lamb Weston argues that its alleged statements do not
 4 constitute a clear and defined promise sufficient for a promissory
 5 estoppel claim, but were merely confirming the expectation of a long-
 6 term, mutually satisfactory relationship. In support, Lamb Weston
 7 cites to *Havens v. C & D Plastics*, 124 Wn.2d 158 (1994). In *Havens*, a
 8 fired employee brought suit on a claim of promissory estoppel,
 9 alleging that the employer made a number of statements that amounted
 10 to a promise that the plaintiff could only be fired for just cause.
 11 *Id.* The Washington Supreme Court found no promise on the basis that
 12 the statements were typical of those made in the job application and
 13 hiring process. *Id.* at 174. The court reasoned that parties in such
 14 situations naturally want a "long term relationship" of employment.
 15 *Id.*

16 Lamb Weston's reliance on *Havens* is misplaced. The Washington
 17 Supreme Court specifically qualified, "where the terminable at will
 18 doctrine is concerned, the promise for promissory estoppel must be a
 19 'clear and definite promise.'" *Id.* (emphasis added). This matter does
 20 not involve an employment relationship. Further, the interaction
 21 relating to construction of a test kitchen is not a "typical" exchange
 22 between business associates; rather, it was specific to each party's
 23 unique circumstances and required significant detriment on behalf of
 24 Mastaba equaling a year's worth of Mastaba's revenue. ECF No. 48 ¶ 9.

25 Mastaba in turn cites to *Hellbaum v. Burwell & Morford*, 1 Wn.
 26 App. 694 (1969). In *Hellbaum*, the Washington appeals court held "the

doctrine of promissory estoppel has been applied to render enforceable a gratuitous or somewhat indefinite promise to obtain insurance." *Id.*

This Court accepts that, if proven, a promise for a long-term contract in exchange for specific capital investments is definitive enough to support a promissory estoppel claim. Further, if as Mastaba contends that but for this promise, the capital investments would not have been undertaken, ECF No. 49 ¶¶ 8-20, then this reliance could be justifiable on account of the respective parties' long-term business relationship and Lamb Weston's oversight of the construction and planning of the test kitchen. ECF No. 49 Exs. A-F. The Court finds there is a factual dispute as to each of the first four elements of a promissory estoppel claim as well as the fifth and final element: whether injustice can be avoided without enforcing the promise. Lamb Weston's motion for summary judgment is denied in this regard.

3. Mastaba's Claim for Fraud Pursuant to Promise of Long-Term Contract⁴

Mastaba additionally seeks damages for fraud on the basis that Lamb Weston knowingly communicated false, material information to Mastaba that it would be its long-term sales representative.

To recover for fraud, the following elements must be proved by clear, cogent, and convincing evidence:

⁴ Although Mastaba's arguments for fraud are primarily addressed in this section, they may also be relevant to Lamb Weston's defense under the Independent Duty Doctrine in Section B.

1 (1) a representation of an existing fact; (2) its
 2 materiality; (3) its falsity; (4) the speaker's knowledge
 3 of its falsity or ignorance of its truth; (5) his intent
 4 that it should be acted on by the person to whom it is
 made; (6) ignorance of its falsity on the part of the
 person to whom it is made; (7) the latter's reliance on the
 5 truth of the representation; (8) his right to rely upon it;
 [and] (9) his consequent damage.

6 *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 394 (1969).

7 Lamb Weston cites to *Shook v. Scott*, 56 Wn.2d 351 (1960), to
 8 support its argument that the alleged assurance of a long-term
 9 relationship was not a representation of existing fact but a
 prediction. ECF No. 32. In *Shook*, the Washington Supreme Court
 10 stated that predictions, without an express or implied undertaking to
 11 make them come true, do not constitute such representations or
 12 promises as will support actionable fraud. 76 Wn.2d at 362-63.

13 The Washington Supreme Court in *Markov* stated two theories in
 14 which the rule that mere predictions do not necessarily constitute
 15 representations is inapplicable. *Markov*, 76 Wn.2d at 396. The first,
 16 "if a promise is made for the purpose of deceiving and with no
 17 intention to perform, it constitutes such fraud as will support an
 18 action for deceit." *Id.* Additionally, "if the promise is made
 19 without care or concern whether it will be kept, and the promisor
 20 knows or under the circumstances should know that the promisee will be
 21 induced to act or refrain from acting to his detriment, the promise
 22 will likewise support an action by the promisee." *Id.*

23 Disputed evidence indicates that Lamb Weston was seeking direct
 24 solicitation with Philippine purchasers while simultaneously directing
 25

1 and overseeing Mastaba's construction of the test kitchen.⁵ Further,
 2 despite Mr. Neal informing Mastaba he would "look into" a five-year
 3 contract, Mr. Neal did not ask for a long-term agreement from another
 4 Lamb Weston employee, but only a standard broker agreement. ECF No. 51
 ¶ 17; & ECF No. 51 Ex. X.

6 Alternatively, evidence additionally supports that Mr. Neal made
 7 a promise that induced Mastaba to take actions to Mastaba's detriment
 8 without care for whether it was kept. Despite Mr. Neal's alleged
 9 promise of a long-term contract, Mr. Neal may not have had the
 10 authority to enter into such a contract. ECF No. 51 ¶ 1 & ECF No. 49 ¶
 11 55. Mr. Johnson contends that it wasn't until September 9, 2011, that
 12 Mr. Neal revealed this lack of authority. *Id.* This was after Mr.
 13 Neal had worked closely with Mastaba on the construction of the test
 14 kitchen. *Id.*

15 Thus, this Court finds sufficient evidence to present a genuine
 16 issue of material fact as to whether Lamb Weston committed fraud.
 17 Accordingly, Lamb Weston's motion for summary judgment is denied in
 18 this regard.

19
 20
 21 ⁵ During long-term contract negotiations, Mr. Neal wrote in an e-
 22 mail to Mastaba "our intent is to directly service accounts that
 23 request it but we can deal with this on an annual basis each year
 24 as we work to renew for the upcoming year." ECF No. 51, Ex. W.
 25 Mastaba additionally alleges Lamb Weston had engaged directly with
 26 Philippine purchaser "PTC" to avoid paying commission to Mastaba.
 ECF No. 51 ¶ 13.

1 **4. Obligation to Negotiate in Good Faith**

2 Lamb Weston contends that Mastaba's assertion of an alleged oral
3 promise that Lamb Weston would "enter into a written, long-term sales
4 representation contract," even if assumed for arguendo purposes, is an
5 agreement to agree which is unenforceable in Washington.

6 Both Mastaba and Lamb Weston cite heavily to *Keystone Land &*
7 *Development v. Xerox Corp.* 152 Wn.2d 171 (2004), in support of their
8 positions. In *Keystone*, the Washington Supreme Court distinguished
9 between an unenforceable agreement to agree and an enforceable
10 contract to negotiate. *Id.* In the latter, "when a contract has been
11 formed, Washington courts have recognized that there can be a
12 contractual obligation to negotiate further agreements in good faith." *Id.* at 174. Forming a contract to negotiate requires mutual assent to
13 be bound with sufficiently definite terms supported by consideration.
14 *Id.* at 178. Mutual assent to be bound is typically a question of fact
15 for the fact finder. *Id.*

17 As discussed, whether the parties had reached the required terms
18 to form a contract to negotiate in good faith remains a question of
19 fact. Moreover, the evidence that indicates Mr. Neal never attempted
20 to arrange for this long-term contract would constitute a breach to
21 negotiate the further terms in good faith. ECF No. 51 ¶ 17-20 & Ex.
22 X. Lamb Weston's motion to dismiss Mastaba's claim for a breach of a
23 contract to negotiate in good faith as a matter of law is denied.

24 ///

25 //

26 /

1 **B. Mastaba's Claims Relating to its 2011 Expenses and Capital**
 2 **Investments and Future Sales or Services Beyond 2011 Service**
 3 **Agreement**

4 Lamb Weston argues that summary judgment dismissal of Mastaba's
 5 claims for damages relating to its 2011 capital investments and future
 6 sales or services is proper because the 2011 service agreement
 7 expressly controls the disputes. First, Lamb Weston argues that the
 8 2011 agreement terminated by its own terms on December 31, 2011, which
 9 precludes any damages for future sales.⁶ Next, Lamb Weston points to
 10 the following portions of the 2011 service agreement which it contends
 11 explicitly resolve Mastaba's claims for damages relating to capital
 12 investments and operating expenses:

13 [Mastaba] shall also be responsible and liable for any and
 14 all expenses incurred by [Mastaba] while performing the
 15 Services. Extraordinary expenses (such as sales shows,
 16 meetings outside the Philippines and customers' factory
 17 visits) that are pre-approved by me in writing and in
 18 advance will be reimbursed by LW.

19 ECF No. 1, Ex. A.

20 [t]his Agreement represents the entire agreement between LW
 21 and [Mastaba] and also supersedes all prior negotiations,
 22 representations or agreements, either written or oral.

23 *Id.*

24 ⁶ The 2011 service agreement states in pertinent part, "effective as of
 25 January 1, 2011, and shall terminate on December 31, 2011 unless
 26 extended by a written agreement signed by both parties at least ninety
 (90) days before the termination." ECF No. 1, Ex. A.

1 However, Mastaba argues it has claims that would warrant damages
 2 arising independently of this 2011 service agreement that create a
 3 question of fact. Further, Mastaba alleges that dealings between the
 4 parties created a separate implied in fact contract to which the 2011
 5 service agreement's terms would be inapplicable.

6 **1. Negligent Misrepresentation Independent of Contract**

7 Mastaba makes a claim for negligent misrepresentation
 8 independent of the 2011 service agreement relating to damages incurred
 9 from its capital investments. ECF No. 1 ¶¶ 90-93. Lamb Weston seeks
 10 dismissal of this claim on the basis of the independent duty doctrine.

11 The independent duty doctrine was formerly called the "economic
 12 loss rule." *Elcon Const., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 165
 13 (2012). This rule barred "recovery for alleged breach of tort duties
 14 where a contractual relationship exists and the losses are economic
 15 losses. If the economic loss rule applies, the party will be held to
 16 contract remedies, regardless of how the plaintiff characterizes the
 17 claims." *Alejandre v. Bull*, 159 Wn.2d 674, 683 (2007). The Washington
 18 Supreme Court has recently pronounced the economic loss rule a
 19 "misnomer" and has adopted in its stead the "independent duty
 20 doctrine." *Jackowski v. Borchelt*, 174 Wn.2d 720, 729 (2012). The
 21 present test is "whether the injury is traceable also to a breach of a
 22 tort law duty of care arising independently of the contract."
Eastwood v. Horse Harbor, 170 Wn.2d at 380, 393 (2010).

24 The Washington Supreme Court stated "in Eastwood we directed
 25 lower courts not to apply the [independent duty] doctrine to [bar]
 26 tort remedies 'unless and until this court has, based upon

1 considerations of common sense, justice, policy and precedent, decided
2 otherwise.'" *Elcon Const., Inc.*, 174 Wn.2d at 157, (quoting *Eastwood*,
3 170 Wn.2d at 417). See also *Donatelli v. D.R. Strong Consulting*
4 *Engineers, Inc.*, 179 Wn.2d 84, 95 (2013) (Washington Supreme Court
5 held a "duty to avoid misrepresentations that induce a party to enter
6 into a contract arises independently of the contract.").

7 Based on the foregoing authority, this Court finds Mastaba's
8 claim of a duty not to engage in negligent misrepresentation arises
9 independently of the 2011 service agreement. The prior discussion
10 relating to fraud also applies here to the extent that a claim for
11 fraud may arise independent of a contract. See *Flower v. T.R.A.*
12 *Industries, Inc.*, 127 Wn. App. 13 (2005) (holding that a plaintiff is
13 able to base a claim on negligent misrepresentation when a promise is
14 made with no intention of performing).

15 Although Lamb Weston did not address the merits of Mastaba's
16 negligent misrepresentation claim in its initial motion for summary
17 judgment, Mastaba contends that Lamb Weston has liability because Mr.
18 Neal lacked the authority to commit Lamb Weston to a long term
19 engagement with Mastaba. ECF No. 44. Lamb Weston's motion for
20 summary judgment dismissal of Mastaba's claim for negligent
21 misrepresentation is denied.

22 **2. Mastaba's Quantum Meruit and Unjust Enrichment Claims**

23 Mastaba seeks damages on claims of quantum meruit and unjust
24 enrichment. While Washington courts historically used quantum meruit
25 and unjust enrichment synonymously, the Washington Supreme Court has
26 recently clarified that they are legally distinct, with "distinct

1 approaches founded on discrete legal theories." *Young v. Young*, 164
 2 Wn.2d 477, 483 (2008). These claims will be addressed separately for
 3 purposes of this motion.

4 **a. Unjust Enrichment**

5 Mastaba claims it is entitled to unjust enrichment because it
 6 conferred a benefit to Lamb Weston by 1) negotiating sales and sales
 7 contracts on its behalf, and 2) establishing the Philippine frozen
 8 potato market which Lamb Weston took advantage of by engaging in
 9 direct sales to Philippine purchasers. ECF No.1 ¶¶ 83-85.

10 Unjust enrichment is the method of recovery for the value of the
 11 benefit retained absent any contractual relationship because notions
 12 of fairness and justice require it. *Young*, 164 Wn.2d at 484. The
 13 elements that must be proven by the plaintiff are 1) the defendant
 14 receives a benefit, 2) the received benefit is at the plaintiff's
 15 expense, and 3) the circumstances make it unjust for the defendant to
 16 retain the benefit without payment. *Id.*

17 Lamb Weston contends that unjust enrichment does not apply
 18 because the 2011 service agreement covers the dispute. Specifically,
 19 Mastaba was to provide "certain services during the term of this
 20 Agreement in the field of frozen potato sales and marketing,
 21 forecasting and order coordination in the Philippines, as reasonably
 22 requested and defined by [Lamb Weston]." ECF No. 1, Ex. A. Similar
 23 provisions existed in the one-year service agreements between Lamb
 24 Weston and Mastaba from 1998-2010. ECF No. 34, Ex. 1A-1M.

25 Because Mastaba and Lamb Weston were in a contractual
 26 relationship relating to Mastaba selling Lamb Weston potato products

1 in the Philippines from 1998-2011, Mastaba may not make an unjust
 2 enrichment claim relating to "establishing the potato market." See
 3 *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604 (1943) (finding
 4 no contract implied in law because it related to an expressed contract
 5 plaintiff was operating under when performing services to which he
 6 based unjust enrichment claim). Establishing the market was
 7 necessarily done pursuant to Mastaba's service agreements with Lamb
 8 Weston for which Mastaba received payment. Finally, Mastaba does not
 9 have an unjust enrichment claim for "negotiating sales and sales
 10 contracts" due to this Court's decision holding Lamb Weston liable to
 11 pay commission for sales negotiated under the 2011 service agreement.
 12 Accordingly, Lamb Weston's motion for partial summary judgment
 13 requesting dismissal of Mastaba's unjust enrichment claims is granted.

14 **b. Quantum Meruit**

15 Mastaba requests quantum meruit because Lamb Weston requested
 16 Mastaba make capital investments, Mastaba expected payment or exchange
 17 of value in return, and Lamb Weston failed to pay for said
 18 investments.⁷ Lamb Weston seeks summary judgment in its favor on this
 19 claim.

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21

22 ⁷ Mastaba makes an additional quantum meruit claim on the basis of
 23 negotiating sales and sales contracts on Lamb-Weston's behalf for which
 24 it failed to make payment. ECF No. 1 ¶¶ 73-77. This claim is not
 25 considered in light of this Court's decision holding Lamb Weston liable
 26 for payment of commission relating to sales made pursuant to the 2011
 service agreement.

1 Quantum meruit is the method of recovering the reasonable value
2 of services provided under a contract implied in fact. *Young*, 164
3 Wn.2d at 485. The elements of an implied in fact contract are 1) the
4 defendant requests work, 2) the plaintiff expects payment for the
5 work, and 3) the defendant knows or should know the plaintiff expects
6 payment for the work. *Id.* at 486.

7 Lamb Weston contends the 2011 service agreement covers the
8 dispute which cannot be negated by a contract implied in fact.
9 However, "the conduct of one or more parties to an express contract
10 may be such that performance is removed from the confines of the
11 express contract." *Pierce County v. State*, 144 Wn. App. 783, 830
12 (2008). See also *Modern Builders, Inc. of Tacoma v. Manke*, 27 Wn. App.
13 86 (1980) (allowing quantum meruit claim when parties' conduct was
14 removed from express contract).

15 The 2011 service agreement has no mention of a test kitchen.
16 ECF No. 1, Ex. A. Mastaba alleges Lamb Weston never before requested
17 such a significant investment in its years of prior dealings. ECF No.
18 51. Further, despite the provision in the 2011 service agreement
19 relating to Mastaba's services being within its "sole control and
20 discretion," ECF No. 1, Ex. A, Lamb Weston was heavily involved in the
21 process of overseeing and directing the construction of the test
22 kitchen. ECF No. 49, Exs. A-F (e-mail exchanges between Mastaba and
23 Lamb Weston detailing Lamb Weston's directions on what to order, and
24 requesting weekly updates).

25 There is sufficient evidence that the parties deviated from
26 their 2011 service agreement in the construction of the test kitchen,

1 creating a factual dispute as to whether an implied in fact contract
2 existed. See *Kilthau v. Covelli*, 17 Wn. App. 460, (1977) (holding that
3 an existence of an implied contract is a question for the trier of
4 fact). Lamb Weston's request for dismissal of Mastaba's quantum
5 meruit claims is denied in this regard.

6 **C. Conclusion**

7 In light of the foregoing analysis, Lamb Weston's motion for
8 partial summary judgment is denied in part and granted in part. There
9 are genuine issues of fact relating to whether Lamb Weston gave
10 assurances that a long-term contract would be given to Mastaba in
11 exchange for capital investments. The existence of this promise or
12 agreement would support damages arising from claims for breach of
13 contract, promissory estoppel, and fraud.

14 Further, Mastaba has established a genuine issue of fact as to
15 whether the parties deviated from the 2011 service agreement by
16 allegedly requesting and then overseeing the construction of a test
17 kitchen, which creates a question of fact for a quantum meruit claim.
18 However, Mastaba's unjust enrichment claim seeks recovery based on
19 establishing the potato market, which is not distinct from Mastaba's
20 duties under applicable contracts, and is therefore dismissed as a
21 matter of law.

22 **IV. Mastaba's Motion for Summary Judgment**

23 Mastaba requests partial summary judgment on the issue of
24 liability for amounts owed under the 2011 service agreement. The
25 parties disagree as to the particular sales for which Lamb Weston must
26 pay fees to Mastaba under this agreement.

1 **A. Background**

2 The 2011 service agreement's effective term dates were from
 3 January 1, 2011, through December 31, 2011. The 2011 service
 4 agreement did not specifically address payment of post-termination
 5 sales fees. The applicable portions of the 2011 service agreement are:

6 Services: [Mastaba] will perform services during the
 7 term of this Agreement in the field of frozen potato sales
 8 and marketing, forecasting and order coordination in the
 Philippines, as reasonably requested and defined by myself,
 or my designee ("Services").

9 Fees: As full payment for the performance of
 10 [Mastaba's] Services and the other agreements made herein,
 11 [Lamb Weston] will pay Mastaba a fee equal to 2.1%, per net
 12 pound of ALL non-McDonald's LW French fry sales delivered
 to the Philippines, upon receipt of invoice. For example,
 the fee will be paid to [Mastaba] for sales to Jollibee,
 Leysam, Multi M, or other distributor developed by
 Mastaba.

13 ECF No. 40, Ex. A.

14 Mastaba, on behalf of Lamb Weston, negotiated sales contracts
 15 with IFFSI, QSR, and Jollibee foods in 2011 for the sale of Lamb
 16 Weston frozen potato products. A contract was entered with IFFSI on
 17 October 6, 2011, for the sale of Lamb Weston products from November 1,
 18 2011, through December 31, 2012. All sales by Lamb-Weston to IFFSI in
 19 this period were made pursuant to the contract.

20 Mastaba, on behalf of Lamb Weston, negotiated a sales contract
 21 on October 11, 2011, for sale of Lamb Weston frozen potato products to
 22 QSR from November 1, 2011, through October 31, 2012. In 2011 and
 23 2012, Lamb Weston made sales pursuant to the QSR contract in excess of
 24 \$3,281,8320.80.

25 Lamb Weston paid Mastaba for a limited number of sales made
 26 pursuant to the QSR and IFFSI contracts that were ordered in 2011 and

1 2012 and delivered to the Philippines in early 2012. Lamb Weston has
2 not paid Mastaba for all other sales made pursuant to these contracts
3 that were ordered and delivered in 2012.

4 The Jollibee contract was executed in December 2011 and covered
5 all sales in 2012, and Lamb Weston made sales pursuant to this
6 contract in excess of \$3,613,116. Lamb Weston paid Mastaba for a
7 limited number of sales made pursuant to the Jollibee sales contract
8 that were ordered in 2011 and 2012 and delivered in 2012. Lamb Weston
9 has not paid for all other sales pursuant to this sales contract that
10 were ordered and delivered in 2012.

11 Mastaba negotiated a sale of Lamb Weston "mini crisscut French
12 fries" to Jollibee to be shipped in 2012. Lamb Weston completed sale
13 and shipment as provided by Mastaba's negotiation, but has not paid
14 fees to Mastaba.

15 **B. Authority and Analysis**

16 Mastaba argues that it is entitled to commission for the sales
17 made through the contracts it negotiated under the procuring cause of
18 sale doctrine.

19 "Under the procuring cause of sale doctrine, when a party is
20 employed to procure a purchaser and does procure a purchaser to whom a
21 sale is eventually made, that party is entitled to a commission
22 regardless of who makes the sale." *Washington Professional Real*
23 *Estate LLC v. Young*, 163 Wn. App. 800, 809 (2011) (citations omitted).
24 Because the 2011 service agreement does not explicitly cover fees for
25 post-termination sales made pursuant to the 2011 service agreement,
26 ECF No. 1, Ex. A, a discussion of the procuring cause doctrine is

1 warranted. See *Poggi v. Tool Research & Eng'g Corp.*, 75 Wn.2d 356
 2 (1969) (applying procuring cause doctrine to post-termination sales
 3 because contract for commission of sales did not specify that the
 4 remittances need be received prior to termination).

5 Lamb Weston first argues that the procuring cause doctrine is
 6 inapplicable because Mastaba was not its broker, but instead was
 7 contracted for services as requested. The Washington Supreme Court
 8 defines a broker as "one who is engaged for others, on a commission,
 9 to negotiate contracts relative to property with the custody of which
 10 he has no concern." *Gile v. Tsutakawa*, 109 Wn. 366, 375 (1920). More
 11 succinctly put, "a broker is a middle man between parties." *Chambers*
 12 *v. Kirkpatrick*, 142 Wn. 630, 634 (1927).

13 In Lamb Weston's "brokerage documents" attached to Mr. Johnson's
 14 declaration, Mastaba is listed as "Broker 240." See ECF No. 40, Exs.
 15 F-I. In ECF No. 54 ¶ 22, Mr. Neal describes Mastaba as its "broker."
 16 Mastaba is additionally described as a "broker" in an e-mail exchange
 17 between Lamb Weston employees. ECF No. 50, Ex. C. Finally,
 18 Mastaba's role is indicative of a broker relationship, as it acted as
 19 the "middle man" between Philippine buyers and Lamb Weston, in which
 20 it negotiated the sales contracts. ECF Nos. 21 & 39. The facts
 21 conclusively indicate Mastaba operated under a "broker" arrangement
 22 for Lamb Weston.

23 Lamb Weston next argues that even if Mastaba was its broker,
 24 Mastaba was not the procuring cause of the sales at issue because
 25 Mastaba had a limited negotiation-based role. "A broker is a
 26 procuring cause of a sale if it sets in motion a series of events

1 culminating in the sale and, in doing so, accomplishes what the broker
 2 undertook under the agreement." *Wash. Prof'l Real Estate LLC v.*
 3 *Young*, 163 Wn. App. 800, 810 (2011).

4 Lamb Weston has admitted that its 2012 sales contracts with
 5 IFFSI, QSR, and Jollibee were entered into pursuant to negotiations
 6 with Mastaba acting at Lamb Weston's direction. ECF No. 21 ¶¶ 38, 42,
 7 & 46. Lamb Weston's payment of fees to Mastaba after the 2011 service
 8 agreement expired runs counter to its argument that the end of the
 9 2011 term ends a requirement to pay Mastaba fees. Mastaba arranged
 10 for the sales and should not be precluded from the fees pursuant to
 11 the 2011 service agreement merely because the delivery took place in
 12 2012. Thus, Mastaba as a matter of law was the procuring cause of the
 13 2012 sales made pursuant to the three at issue contracts, in addition
 14 to the sale of "crisscut fries" to Jollibee in 2011 separate from the
 15 Jollibee contract. Mastaba is entitled to the applicable fees
 16 pursuant to the 2011 service agreement for these sells.

17 Mastaba's motion for partial summary judgment that Lamb Weston
 18 is liable for amounts owed under their 2011 brokerage contract is
 19 granted.

20 **V. Mastaba's Motion for Relief from Limitation on Requests For**
 21 **Production**

22 On October 15, 2013, this Court issued a Scheduling Order that
 23 "Requests for Production shall be limited to 30 requests, including
 24 subsections." ECF No. 26 (emphasis added). On March 12, 2014, Mastaba
 25 filed this motion for requested relief from the order limiting
 26

1 Requests for Productions (RFPs) to allow it an additional seven RFPs.
2 ECF No. 37.

3 **A. Factual Background**

4 On October 11, 2013, Mastaba issued a first set of RFPs on Lamb
5 Weston. The first set contained 45 RFPs seeking "shipping,
6 accounting, and other related documents" concerning "Lamb Weston's
7 failure to pay commission." ECF No. 37 at 3. Mastaba claims this set
8 did not address document production related to "issue 2." *Id.* "Issue
9 2" regards the existence of a long-term business contract and
10 Mastaba's claims of fraud, negligent misrepresentation, quantum
11 meruit, promissory estoppel, and breach of a unilateral contract.
12 *Id.* Mastaba asserts that it did not include these in the first set
13 because the existence of a long-term contract is a distinct claim from
14 the breach of contract claim addressed in the first set and it was not
15 aware a limitation would be placed. *Id.*

16 Mastaba claims that RFPs 45-50 address issues of material fact
17 since the RFPs "seek disclosure of documents related to Lamb Weston's
18 misrepresentations and assurances that Mastaba's long-term position
19 was secure and that Lamb Weston would provide a long term contract."
20 ECF No. 37. Mastaba additionally contends that RFPs 51 and 52 concern
21 damages relating to Lamb Weston's sales volume in the Philippines
22 after Mastaba's brokerage agreement was terminated.

23 As is set forth below, Lamb Weston requests a denial for the
24 additional RFPs.

25 //
26 /

1 **B. RFPs 46-50**

2 Lamb Weston contends that the additional RFPs 46-50 would be
 3 repetitive and are unnecessary. RFPs 46-50 read as follows:

4 RFP 46: Provide all documents that refer or relate
 5 to the construction of the Test Kitchen by Mastaba.

6 RFP 47: Provide all documents that refer or relate
 7 to Lamb Weston's entry into a long term business
 8 relationship with Mastaba.

9 RFP 48: Provide all documents that refer or relate
 10 to Defendants' efforts to negotiate a multi-year contract
 11 with Mastaba beginning on or about January 1, 2012.

12 RFP 49: Provide all documents that refer or relate
 13 to the February 18, 2011, meeting between Kenneth Soh,
 14 Michael Neal and Patrick Johnson.

15 RFP 50: Provide all documents that refer or relate
 16 to Lamb Weston's desire that Mastaba increase its business
 17 investments in 2011, including but not limited to any
 18 documents received or reviewed by Kenneth Soh or Michael
 19 Neal prior to their meeting with Patrick Johnson on
 20 February 18, 2011.

21 ECF No. 37

22 Federal Rule of Civil Procedure 34 allows a party to request
 23 documents "within the scope of Rule 26(b)." Rule 26(b)(1) outlines
 24 the scope of discovery to be "any nonprivileged matter that is
 25 relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).
 26 However, courts maintain broad discretion to limit discovery, even
 27 when the materials are within the scope of Rule 26(b). Fed. R. Civ. P.
 28 26(c). To determine whether discovery is appropriate requires a
 29 balancing of plaintiff's need for the information and the possible
 30 prejudice to defendant if discovery is allowed. *Vollert v. Summa*
31 Corp., 389 F.Supp. 1348, 1351 (D. Haw. 1975).

32 While Mastaba clearly outlines why it needs the information, ECF
 33 No. 37 at 4, Lamb Weston did not explain why the information sought is
 34 burdensome. ECF No. 44. As the Advisory Committee Notes to the 2006

1 Amendment to Rule 26 point out, "the responding party must show that
 2 the identified sources of information are not reasonably accessible
 3 because of undue burden or cost." Fed R. Civ. P. 26 Advisory Notes
 4 (2006). Further, Lamb Weston states that it is already performing
 5 another search relating to additional documents that pertain to the
 6 RFPs 46-50 request, which is indicative of a low burden. ECF No. 44
 7 at 2.

8 Considering the complex nature of Mastaba's claims, the multiple
 9 annual service agreements spanning over years, and various third-party
 10 client business transactions in dispute, a large set of RFPs appears
 11 reasonable. Moreover, separating the specific 2011 disputes from the
 12 documents that relate to long-term business relationships is
 13 reasonable due to the distinct nature of the claims involved.
 14 Mastaba's requested additional RFPs 46-50 are granted.

15 **C. RFPS 51 and 52**

16 Mastaba contends the RFPs 51 and 52 seek to address material
 17 facts relating to damages. ECF No. 37 at 5. The RFPs read as
 18 follows:

- 19 • RFP 51: Provide all accounting documents that evidence
 20 Lamb Weston's total sales volume of frozen potato
 21 products in the Philippines (excluding sales to
 22 McDonald's) from January 1, 2012, through March 12,
 23 2014.
- 22 • RFP 52: Provide all documents that Lamb Weston has
 23 relied upon or will rely upon in projecting its future
 24 sales volume of frozen potato products in the
 25 Philippines.

26 ECF No. 37 at 5.

Lamb Weston argues that Mastaba's RFPs 51 and 52 relate to claims that are not viable as a matter of law because none of Mastaba's theories allow Mastaba to enforce against Lamb Weston an unwritten long-term contract, as laid out in Lamb Weston's motion for summary judgment. Given the foregoing decision denying Lamb Weston's partial motion for summary judgment relating to an unwritten long-term contract, Mastaba's requested additional RFPs 51 and 52 are granted.

8 It does not appear from the facts that Mastaba has acted in bad
9 faith or that it is abusing the discovery process in any way. Mastaba
10 has shown that the information sought is critical to the issues in
11 contention. Lamb Weston has not shown that the RFPs would be
12 burdensome, nor has it purported that the RFPs are overly broad
13 requests. Mastaba's motion for relief from limitation on discovery is
14 granted.

VI. CONCLUSION

For the above-given reasons, IT IS HEREBY ORDERED:

1. Lamb Weston's Motion for Partial Summary Judgment, ECF No.

32, is GRANTED IN PART and DENIED IN PART as follows:

- Lamb Weston's request for dismissal of damages relating to an unwritten long-term contract is **DENIED**.
- Lamb Weston's request for dismissal of all Mastaba's claims for damages under a theory of unjust enrichment is **GRANTED**. Dismissal of Mastaba's other claims relating to future sales or services is **DENIED**.

1 • Lamb Weston's request for dismissal of Mastaba's claims
2 for damages for 2011 operating expenses and capital
3 investments is **DENIED**.

4 2. Mastaba's Motion for Partial Summary Judgment, **ECF No. 39**,
5 is **GRANTED**.

6 • Lamb-Weston, Inc., ConAgra Foods, Inc., ConAgra Foods
7 Lamb Weston, Inc., and Lamb-Weston Sales, Inc.
8 (collectively, "Lamb-Weston") are liable to Mastaba in
9 the amount of 2.1% per net pound for all sales made
10 pursuant to the contract Lamb-Weston signed with
11 International Family Foods Services, Inc. on or about
12 October 6, 2011.

13 • Lamb-Weston is liable to Mastaba in the amount of 2.1%
14 per net pound for all sales made pursuant to the
15 contract Lamb-Weston signed with QSR/Express Commissary,
16 Inc. on or about October 11, 2011.

17 • Lamb-Weston is liable to Mastaba in the amount of 2.1%
18 per net pound for all sales made pursuant to the
19 contract Lamb-Weston signed with Jollibee Foods
20 Corporation on or about December 13, 2011.

21 • Lamb-Weston is liable to Mastaba in the amount of 2.1%
22 per net pound for all sales of Mini Crisscut French
23 fries to Jollibee Foods Corporation as provided by
24 Mastaba's negotiation.

3. Mastaba's Motion from Limitation on Requests for Production, **ECF No. 37**, is **GRANTED**. Mastaba is granted relief from the limitation on requests for production as stated in the Scheduling Order (ECF No. 26 ¶ 5(b)), and is permitted to propound the seven requests for production in the form attached as Exhibit B to the Declaration of Kyle J. Silk-Eglit, ECF No. 38, in Support of Plaintiff Mastaba Inc.'s Motion for Relief from Limitation on Requests for Production.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 27th day of May 2014.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge